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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SIMON & SCHUSTER, INC.,

Petitioner,

—v.—

MEMBERS OF THE NEW YORK STATE CRIME VICTIMS BOARD, GENNARO FISCHETTI, GEORGE L. GROBE, JR., DIANE MCGRATH, and ANGELO PETROMELIS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Perhaps because it is extraordinarily rare for a statute to be upheld under strict scrutiny, the Board struggles for the bulk of its argument to demonstrate that New York Executive Law § 632-a is not subject to that exacting standard of review. But a statute restricting payment only for speech, and only for speech of specified content, so impairs free speech interests by deterring the creation and publication of the affected speech that it is necessarily subject to strict scrutiny.

Section 632-a cannot survive strict scrutiny. The interests said to be advanced by the statute could be served by generally applicable legislation; none of those interests requires the burdens of the statute to be borne only by the specified speech.

POINT I

SECTION 632-A IS SUBJECT TO EXACTING SCRUTINY

A. Section 632-a Directly Burdens Speech

Our opening brief demonstrated that section 632-a's restriction on payment for expression directly burdens protected speech and that the uncontradicted record in this case evidences those burdens. *Wiseguy* would not have been written or published had Simon & Schuster not undertaken to make payment to Hill. S&S Br. 7, 16-21.[1]

1. The argument that section 632-a does not "directly or substantially burden free speech or publication since . . . criminals who choose to speak and entities who wish to disseminate the criminal's message are not prohibited from doing so" (Bd. Br. 22) disregards this Court's holdings, the principles of basic economics, the underlying premises and incentives of copyright law, and the Court of Appeals' specific finding that "[w]ithout a financial incentive to relate their criminal activities, most would-be story

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1 References to Simon & Schuster's opening brief are given as "S&S Br.", and to the Board's Brief as "Bd. Br."

tellers will decline to speak or write." Petition 11a; *see* S&S Br. 17-21.

No one would doubt that a law forbidding compensating judges for their work, or requiring them to wait five years for any payment to ensure the availability of funds for any judgments rendered against them personally, would diminish the ranks of those able to serve as judges. So too a law forbidding payment of writers for certain kinds of books deters the creation and publication of the books for which writers cannot be paid. The Second Circuit unanimously agreed that section 632-a has this damaging effect (Petition 6a, 11-12a, 26a), and nothing the Board points to undermines that holding.

The Board's labored demonstration that despite its restriction on payment section 632-a does not flatly "prohibit the media from communicating the criminal's message" (Bd. Br. 27-34), and its search for various reasons why some subject to the law might speak despite its burdens, are constitutionally irrelevant. Exacting scrutiny in *Meyer v. Grant* was not premised on any finding that initiative proponents could find *nobody* to circulate their petitions without payment; it was enough that that law, like the section 632-a, had the "inevitable effect of reducing the total quantum of speech that could not be paid for." 486 U.S. 414, 423 (1988). The record and common sense establish that this law has the same harmful effect. S&S Br. 19-21; *see generally* Brief for Motion Picture Association of America, especially at 35-37.

2. The principle that "[f]reedom of speech presupposes a willing speaker," *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976), is beside the point because it is simply not true that "[a] person who speaks only upon receipt of a financial incentive cannot be considered a voluntary or willing speaker." Bd. Br. 23-24. The advances commonly paid by publishers to authors are not paid to overcome authors' unwillingness to speak; rather, they facilitate speech by willing speakers by enabling authors to devote their productive hours to writing instead of other remunerative work. JA 20-21, 27-28, 33, 35, 41.

The dependence of speech on some kind of payment does not deprive it of protection. The *New York Times* is entitled to First Amendment protection when it publishes a paid advertisement, even though one must presume it would be unwilling to publish the advertisement without payment. *New York Times v. Sullivan*, 376 U.S. 254, 266 (1963) (newspaper does "not forfeit that protection because [speech was] published in the form of a paid advertisement").

The creation and dissemination of protected speech frequently depends as a practical matter on payments to individuals (*e.g.*, reporters, novelists, nonfiction writers, lecturers, professors, and union organizers) from the media and other organizations engaging in speech (*e.g.*, newspapers, broadcasters, textbook publishers, churches, unions, political candidates and parties). Absent such payments, the quantity of speech would be grievously diminished, as this Court has repeatedly recognized. *See* S&S Br. 18 n. 15 (citing eight cases); *cf. Cohen v. Cowles Media Co.*, 1991 U.S. LEXIS 3639, *14 (June 24, 1991) (noting newspapers' practice of paying sources for "newsworthy material to be published").

The Board, moreover, misses the point by trying to argue that Hill was not a willing speaker. Apart from the fact that he was, the petitioner here is Simon & Schuster. It was plainly a "willing speaker," having decided to publish an anti-romantic first-hand account of the sordid reality of crime, but it could not communicate its message without payment to Hill.[2] The

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2 The Board attempts to detract from Simon & Schuster's First Amendment interests by repeatedly referring to "Hill's message," rather than Simon & Schuster's or Pileggi's, and suggesting that a literary agent rather than Simon & Schuster conceived the ideas underlying Wiseguy. Bd. Br. 11. But it cannot matter who conceived the project; either way, Simon & Schuster decided that the message of *Wiseguy* was a message it wanted to convey. It is settled that "the constitutional guarantee of freedom of the press embraces the circulation of books as well as their publication." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64 n.6 (1963); *New York Times Co. v. Sullivan*, 376 U.S. at 266; *Lovell v.*

(continued...)

"willingness" of *The New York Times* or *The Washington Post* to speak would not count for much under a law barring them from paying reporters, columnists, or editorial writers. Laws specifically prohibiting the myriad payments on which the system of freedom of expression depends are by their very nature and effect direct burdens on speech drawing strict scrutiny.

3. The issue here is whether the government can prohibit performance of contracts between the press and writers and primary sources, not whether public subsidies can be denied to certain writers or works to implement the goals of statutory programs. Cases holding that the government need not subsidize the exercise of constitutional rights (Bd. Br. 25-27), such as *Lyng v. Int'l Union*, 485 U.S. 360, 369 (1988), and *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983), are therefore irrelevant. There is a fundamental distinction "between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." *Rust v. Sullivan*, 59 U.S.L.W. 4451, 4457-58 (U.S. May 23, 1991) (citation omitted).

Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989), is even further afield. *See* Bd. Br. 26. *Caplin & Drysdale* did not hold that the government could prevent criminal defendants from spending their own funds on attorneys of their own choosing. The money at issue there was derived from drug-law violations, and was subject to forfeiture under a general'y applicable statute. This Court simply held that the defendant had no right to spend the government's money on counsel of his own choosing. 491 U.S. 617, 626-28. Here, by contrast, New York has prohibited Simon & Schuster from spending its own untainted money to secure Henry Hill's labors.

2(...continued)
Griffin, 303 U.S. 444, 452 (1938); *Leathers v. Medlock*, 111 S. Ct. 1438, 1442 (1991) (cable operator).

B. Section 632-a Differentially Regulates Speech

1. The Board advances no reason for narrowly limiting to taxation the rule of *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983). *Compare* Bd. Br. 35-36 *with* S&S Br. 21-22. That the rule goes further, and subjects to strict scrutiny all laws that target expression or the press, whether by taxation or other regulation, is demonstrated by *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 704, 706-07 (1986), where this Court read *Minneapolis Star* to rule that "a statute that has the inevitable effect of singling out those engaged in expressive activity" is subject to demanding justification. *See also Cohen v. Cowles Media Company*, 1991 U.S. LEXIS 3639, *14 (June 24, 1991) (strict scrutiny not required because Minnesota doctrine of promissory estoppel did "not target or single out the press. Rather, insofar as we are advised, the doctrine is generally applicable to the daily transactions of all the citizens of Minnesota"); and *Barnes v. Glen Theatre, Inc.*, 1991 U.S. LEXIS 3633, *11 (June 21, 1991) (applying *United States v. O'Brien*, 391 U.S. 367 (1968), because state "has not banned nude dancing as such, but has proscribed public nudity across the board").

2. The Board alternatively contends that statutes that target the press or expressive activity are, under *Leathers v. Medlock*, 111 S. Ct. 1438, 1447 (1991), strictly scrutinized only if they are "directed at, or presen[t] the danger of suppressing, particular ideas." Bd. Br. 38. *Leathers* applied that analysis to a tax generally applicable to virtually all economic activity, including cable television, but which exempted newspapers and magazines. This Court found that this arrangement could not conceivably favor or disfavor viewpoint, subject matter or ideas, and noted that the generality of the regulation firmly protected against this danger. But *Leathers* did not address a statute distinguishing expression from all other activities; it did not overrule *Minneapolis Star*'s holding that laws differentially regulating expressive activity are subject to strict scrutiny. Statutes targeting expression or the press as a whole are subject to strict scrutiny not only *if* they are targeted at or present the danger of suppressing particular ideas, but *because* such targeting by its very nature presents that danger,

which generality of regulation minimizes. *See* S&S Br. 22, 29 & n. 23.

In any event, this record amply discloses New York's hostility to the particular speech and speakers affected by section 632-a; New York finds such speech to cause "suffering" and "a second harm to the victim" and to be exploitative. *See* S&S Br. 24.

The very structure of section 632-a, moreover, targeting payments to the unpopular class of "criminals" as the sole subject matter of the statute, clearly presents "the danger of suppressing particular ideas" or viewpoints. Speech by criminals is likely to differ from speech by others on such matters as the utility of punishment, the economic causes of crime, and the possibilities of rehabilitation. Strict scrutiny is needed here because the legislature could have, but did not, legislate with generality to minimize the dangers of viewpoint discrimination.

C. Section 632-a Is Content-Based

1. The Board first contends that section 632-a is not content based because it "does not require the Board to 'evaluate the nature of the message.'" Bd. Br. 37. But since "the State itself defined the content of publications that would trigger liability," *Cohen v. Cowles Media Co.*, 1991 U.S. LEXIS 3639 at *15, and payments may pass from publishers to writers and sources only if the speech does not contain "thoughts, feelings, opinions, or emotions" or a "reenactment" of specified events, the restriction is content- and subject-matter based under the plain meaning of that phrase and this Court's cases. *See* S&S Br. 23 & n. 19.

2. The United States concedes that the federal statute, 18 U.S.C. § 3681, "may be characterized as content-based," and that its "reason for singling out this speech is . . . a concern that dissemination of the speech is particularly likely to aggravate the harms suffered by the victims of the crimes committed by the speaker." Brief of the United States ("U.S. Br.") at 10-11 n.15. Section 632-a is equally content-based and equally hostile to the speech at which it is aimed.

3. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986), does not excuse section 632-a from strict scrutiny. First, the *Renton* reasoning has excused a seemingly content-based statute only on its own facts, in a case involving sexually oriented materials, and has no application where strict scrutiny is required because a challenged statute has placed undue burdens on speech or has targeted the press or expressive activity. *Compare* S&S Br. 24-25 *with* Bd. Br. 37-38.[3]

Second, section 632-a and its distinctions are justified not because of concern with anything like neighborhood blight, as was the zoning ordinance at issue in *Renton*, but rather with the public's abhorrence at payments being made for expression of certain content. *See* S&S Br. 24. It is therefore subject to the same scrutiny that would apply to laws barring payment of priests for religious speech (or barring newspapers from paying columnists writing about abortion more than the minimum wage, or barring payment of artists for abstract art), even if the legislature were motivated by public offense and abhorrence at seeing priests (or

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3 The Court in *Renton* manifested no intent to overrule either such content-based strict scrutiny decisions as *Carey v. Brown*, 447 U.S. 455 (1980), and *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984), or such burden-on-expression strict scrutiny cases as *Meyer v. Grant*, 486 U.S. 414 (1988), and *Riley v. Nat'l Federation of the Blind*, 487 U.S. 781 (1987), or such press-targeted strict scrutiny cases as *Minneapolis Star*. In these cases and many others, statutes were invalidated without any finding that they were aimed at the content of speech, and despite plausible attempts to justify them by considerations other than the expected communicative impact of speech. If strict scrutiny were limited to cases where the proponents of regulation admit their concern over the communicative impact of speech, precious little would be left of the doctrine.

Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (Bd. Br. 36, 38) is inapposite, since it addressed a time, place and manner regulation that impacted only on the volume of sound, and did not on its face select activity for regulation on the basis of content or subject matter.

columnists or artists) profit for speech of that content, rather than by offense at content or any purpose to suppress it.

D. *United States v. O'Brien* Is Inapplicable

The argument that *United States v. O'Brien*, 391 U.S. 367 (1968), supplies the correct standard of review here ignores our demonstration that *O'Brien* applies only to general regulations of conduct that are incidentally, and only sometimes, applied to expressive conduct. *O'Brien* cannot apply to a statute that regulates speech "on its face," or to one that regulates speech in all of its applications. *Compare* S&S Br. 26 *with* Bd. Br. 39-40 (failing to cite a single case in which *O'Brien* was applied to a statute aimed at speech-related activity). *See also Cohen v. Cowles Media Co.*, 1991 U.S. LEXIS 3639, *12-14 (*O'Brien* applied because "the Minnesota doctrine of promissory estoppel is a law of general applicability"); *Barnes v. Glen Theatre, Inc.*, 1991 U.S. LEXIS 3633, *11 (not applying strict scrutiny because state banned public nudity generally, not "nude dancing as such"), and *id.* at *22, *28 (Scalia, J., concurring) ("On its face, this law is not directed at expression in particular. . . . A law is 'general' . . . if it regulates conduct without regard to whether that conduct is expressive.").

The contention that payment for speech is "not inextricably intertwined with speech . . . because . . . attaching the criminal's profits is not a barrier to the criminal's speech as the law does not prevent a willing criminal from speaking" (Bd. Br. 39) is squarely contradicted by the record in this case, which shows how this law does deter speech, and by all the cases holding restricting amounts private parties agree to pay and receive in order to create and disseminate speech *is* a direct and substantial barrier to speech. *See* S&S Br. 17-18. An enormous amount of the protected speech on which our free society depends could be effectively suppressed if strict scrutiny were not applicable to laws that delay for years payment for certain expression, but permit such payment for any other service and for expression of different content.

POINT II

SECTION 632-A'S TARGETED APPLICATION ONLY TO PAYMENTS FOR EXPRESSION, AND ONLY TO EXPRESSION OF SPECIFIED CONTENT, CANNOT SURVIVE EXACTING SCRUTINY

Both the Board and the Second Circuit have ignored how unusual, indeed virtually unprecedented, it is to uphold a statute upon exacting review. "Only rarely are statutes sustained in the face of strict scrutiny . . . strict-scrutiny review is 'strict' in theory but usually 'fatal' in fact." *Bernal v. Fainter*, 467 U.S. 216, 219 n.6 (1984) (citation omitted).[4]

So powerful is the First Amendment's direction that "no law" shall abridge free speech that the Court has at times observed that "government has *no power* to restrict expression because of its message, its ideas, its subject matter, or its content," *Police Department of Chicago v. Mosley*, 408 U.S. at 95 (citations omitted, emphasis added), and has recently and unanimously said that strict scrutiny is a "well-nigh insurmountable" burden. *Meyer v. Grant*, 486 U.S. 414, 425 (1988). With the exception of two decisions emphasizing the unique concern for avoiding corruption of the political process, the Court has apparently not upheld on strict scrutiny a single statute challenged as violative of free speech in three decades.[5]

Section 632-a fails strict scrutiny not only because it is not narrowly tailored to serve the State's asserted interest, as we show below, but more fundamentally because its substantial burden on speech is inconsistent with free expression. Here, as in other cases, the harm to freedom of speech far outweighs the extent, if any, by which the law furthers legitimate state interests. *See, e.g.*,

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4 The "strict scrutiny" test applied in equal protection cases such as *Bernal* is the same test applied in the First Amendment context. *Ward v. Rock Against Racism*, 491 U.S. 791, 798 n.6 (1989); *Police Dep't v. Mosley*, 408 U.S. 92, 101 & n.8 (1972).

5 *Austin v. Michigan Chamber of Commerce*, 110 S. Ct. 1391 (1987); *Buckley v. Valeo*, 424 U.S. 1 (1976).

Meyer v. Grant, 486 U.S. at 425-428; *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988) (recovery for speech that intentionally inflicts emotional distress absent proof of "actual malice" would deny "adequate 'breathing space' to the freedoms protected by the First Amendment"); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974) ("It has yet to be demonstrated how governmental regulation [of a right of reply] can be exercised consistent with First Amendment guarantees of a free press. . . ."); *Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965) ("The regime of this Act is at war with the 'uninhibited, robust, and wide-open' debate and discussion that are contemplated by the First Amendment").

The New York Court of Appeals has since our opening brief authoritatively identified the two interests assertedly underlying section 632-a: "preserv[ing] the victim's equitable right to assets earned by a criminal as a result of victimization" (an interest it referred to as ensuring that "criminals should not be permitted to profit from their wrongs") and "impos[ing] on those convicted of crime punishment and disabilities which reflect the nature and extent of the community's denunciation of particular conduct . . ." *Children of Bedford*, 1991 NY LEXIS 647, *17-19 (May 7, 1991). But the Board has not demonstrated that this statute is necessary and narrowly tailored to serve those two interests, or that they are even implicated on the record here.

A. The Interest in Preserving Victims' Rights to Assets Earned Through Victimization Cannot Justify Section 632-a

If existing remedies to enable victims to obtain compensation from criminals are inadequate, they can be generally expanded. New York's attachment statute can be made available in all cases of crime, or for all violent crimes; the statute of limitations can be generally extended for all crime victims; *etc.* Section 632-a enhances victims' remedies, however, as to assets that flow from speech and in no other cases, supposedly because the assets in question are themselves uniquely the result of "victimization" or are uniquely the "profits of crime."

The Board, however, has only *ipse dixit* to support its assertion that all the advances and royalties subject to section 632-a (including the royalties due Hill) are the "profits of crime." Government cannot abridge free speech simply by labeling a broad variety of payments for expression the "profits of crime." Payment for works like *The Autobiography of Malcolm X*, *Wiseguy*, and the other works noted in our opening brief (at pp. 36, 39-40) do not become crime profits through legislative fiat. The undisputed record demonstrates that Henry Hill, who jointly owns the copyright in *Wiseguy*, was paid for providing what authors and primary sources generally provide, hard creative work and long hours. As the Supreme Court held in *Mazer v. Stein*, 347 U.S. 201, 219 (1954), "Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered." *See* S&S Br. 7, and JA 26-27, 30, 83.[6]

The Board's denial that section 632-a underinclusively fails to reach all the other payments received by "criminals" that have as strong a connection to criminal activity as do subsequent writing, on the purported ground that those other payments arise from "newly advertised expertise or prominence," not from an "illegal act," is unavailing. Bd. Br. 47, quoting *Children of Bedford*. Payments like those made to Willie Sutton to consult on bank security, to reformed addicts who become drug rehabilitation

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6 Even outside the First Amendment context, courts have been careful to reject governmental attempts to obtain forfeiture of assets that lack a direct and substantial nexus with the underlying criminal conduct. *See, e.g., United States v. Busher*, 817 F.2d 1409, 1414-16 (9th Cir. 1987) (no forfeiture "of a defendant's entire interest in an enterprise that is essentially legitimate where he has committed relatively minor RICO violations not central to the conduct of the business"); *United States v. Porcelli*, 865 F.2d 1352, 1365 (2d Cir.), *cert. den.*, 110 S. Ct. 53 (1990) (same); *United States v. McKeithen*, 822 F.2d 310, 313-15 (2d Cir. 1987) (vacating forfeiture of entire property and limiting it to 43% portion found by jury to have housed drug enterprise); *United States v. One 1976 Ford F-150 Pick-Up*, 769 F.2d 525, 527 (8th Cir. 1985) (*per curiam*); *United States v. One 1972 Chevrolet Corvette*, 625 F.2d 1026, 1029-30 (1st Cir. 1980).

counselors, to burglars-turned-locksmiths, and to criminals-turned-evangelicals, are no less (and no more) the profits or the result of crime than are the royalties due Henry Hill. Payments made to Gordon Liddy for his appearance in a liquor advertisement now running in several magazines are plainly the result of the notoriety he gained through crime; yet since he does not discuss his crime in the advertisement a statute like New York's would not reach the payment. Payments for writing books that mention prior events deemed crimes are indistinguishable in terms of the state's asserted interests from these other payments that New York has chosen not to regulate. *Compare* S&S Br. 41-43 *with* Bd. Br. 47-49 and *Children of Bedford*, 1991 NY LEXIS 647, *22-23.

Section 632-a's overinclusiveness with respect to this interest is highlighted by the federal statute discussed in the United States' brief. Whatever its other defects arising from its targeting of expression, 18 U.S.C. § 3681 is at least limited so that no restriction on payment for speech can be imposed until after a conviction, at which time it has become clear whether a crime has been committed and whether it has victims.[7] Moreover, even then speech will be deterred by a payment restriction only if the United States Attorney believes, and the court finds, that "the interest of justice or an order of restitution under this title so requires." Thus, under § 3681 publishers are free to enter into publication agreements with all persons, including convicted criminals, without the ongoing deterrent effect of a looming penalty resulting from a possible future determination by an administrative board that the payment was improper at the outset. Indeed, the requirement that a court enter an order before § 3681 applies makes possible further narrowing of the statute's reach; courts might enter orders only in the context of restitution orders reaching all of a convicted

7 Although the Board had previously ruled that victimless crimes are within section 632-a, *see* S&S Br. 5 n.7, the New York Court of Appeals disagreed and recently narrowed section 632-a to exclude victimless crimes, *Children of Bedford*, 1991 NY LEXIS 647, *18. This reduces but surely does not cure the statute's overbreadth.

criminal's after-acquired assets, or only where the prospect of payment induced the crime.

As the United States notes here, during the debates leading to § 3681, "Senator Mathias remind[ed] the Senate that 'the writings of criminal defendants have played an important role in our society and culture' . . . ." As a result, a narrowed statute was enacted, one that "would not apply to most of the literary works described in the petition, see Pet. 14." U.S. Br. at 4, nn. 5 & 6. Section 632-a, by contrast, sweeps well past the interests asserted by the State to deter these works that the federal statute does not deter.

B. Section 632-a Is Not Necessary or Narrowly Tailored To Advance the Interest in Denunciation and Punishment of Criminals

The Board has never suggested that an interest in inflicting additional "punishment," "denunciation," and "retribution" underlies section 632-a, and does not do so here, notwithstanding the Court of Appeals' mention of this interest (without the slightest support in the legislative history) in *Children of Bedford*. *See* Bd. Br. 46.[8] A law functioning simply as a special attachment provision for victims, that applies to those never tried or convicted and to those acquitted by reason of insanity, that assists state tax authorities and judgment creditors generally, that applies to federal as well as state crimes, and that provides for the return of any royalties to convicted criminals if no victims step forward and obtain judgments within five years, is plainly not designed to impose punishment or retribution, and is in any event entirely untailored to serve that interest.

But even assuming *arguendo* that punishment and retribution was a goal of the law, section 632-a is impermissibly overinclusive with respect to that interest. First, by reaching those immunized,

8 Even where intermediate rather than strict scrutiny applies, the Court has refused to consider state interests that are mere afterthoughts that did not actually underlie the enactment in question. *E.g.*, *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 730 (1982); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975).

never tried, or acquitted by reason of mental disease or defect, the law applies far beyond persons who, having been duly convicted, are proper subjects for advancement of that interest, and indeed that interest is not even implicated on these facts. *See* Point II C *infra*. Second, the legislative power to define punishments is no less subject to the specific restraints of the Bill of Rights than are other governmental powers. Even incarcerated prisoners retain certain fundamental constitutional rights (although subject to restraint for reasons of security), *e.g.*, *Procunier v. Martinez*, 416 U.S. 396 (1974) (free speech); *O'Lone v. Shabazz*, 482 U.S. 342 (1987) (free exercise of religion); and *Turner v. Safley*, 482 U.S. 78 (1987) (right to marry); *cf. Skinner v. Oklahoma*, 316 U.S. 527 (1942) (right of procreation). It follows *a fortiori* that states may not impose on all convicted criminals life-long restrictions on the fundamental rights to pray, join a church, marry, or read and write, simply by denominating those restrictions "punishment."

At the same time, section 632-a is not necessary to serve this interest. Given the variety of ways in which states may "impose on those convicted of crime punishment and disabilities which reflect the nature and extent of the community's denunciation of particular conduct," *Children of Bedford*, 1991 N.Y. LEXIS 647, *19, New York could clearly add to its present range of punishments and disabilities, if it determines the need to do so, without effectively suppressing *Wiseguy* and all the other works that section 632-a is likely to deter. *Cf. Meyer v. Grant*, 486 U.S. at 427 (deeming other existing statutes "adequate" to serve state's interest).

The law, moreover, is underinclusive with respect to punishment. *Compare* Bd. Br. 47 *with* S&S Br. 37-43. The Board has not answered our showing that by requiring the return of escrowed royalties not obtained by crime victims in damage actions the Son of Sam law leaves "appreciable damage" to the state's asserted interest unremedied, *see The Florida Star v. BJF*, 491 U.S. 524, 541-42 (1989), making clear that the law cannot be found narrowly tailored to that interest. *Compare* S&S Br. 38 *with* Bd. Br. 17 n. 27 (return to "Capeman" murderer of royalties he had earned).

C. The Interests Asserted Are Not Implicated By The Facts Here And Therefore Cannot Defeat Simon & Schuster's First Amendment Claim

The Court of Appeals' authoritative identification of the two interests underlying section 632-a highlights the law's substantial overinclusivness and establishes that those interests cannot be relied on here, since *Wiseguy* does not implicate them. *Texas v. Johnson*, 491 U.S. 397, 404, 407, 410 (1989); *Spence v. Washington*, 418 U.S. 405, 414 n.8 (1974).

The two interests posited by the Court of Appeals, like the statute on its face and literally every reference to compelling interests in the Board's brief and those of its supporting *amici*, relate solely to persons convicted of crime: to obtain for the victim "assets earned by a *criminal as a result of the victimization*" and to "*impose on those convicted of crime punishment and disabilities* which reflect the nature and extent of the community's denunciation of particular conduct," which the Court referred to as "retributive satisfaction." *Children of Bedford*, 1991 NY LEXIS 647, *17-20 (emphasis added). *See also, e.g.*, Bd. Br. 49 ("The degree of tailoring of the state's interest may also take account of *the fact that criminals have committed a crime* and that society may impose certain restrictions on their ability to profit from that crime.")

These interests may not constitutionally be advanced, and are in any event not served, here, where the Board's decision to apply the law rested not on any conviction but instead solely on the Board's determination that the book contained Hill's "admissions" to having committed crimes. *See, e.g., In re Winship*, 397 U.S. 358, 363-64 (1970) (finding of guilt beyond a reasonable doubt required for stigmatization and condemnation "for commission of a crime"; government "cannot adjudge [individual] guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty"); *Jones v. United States*, 463 U.S. 354, 369 (1983) (interest in retribution cannot be furthered without criminal conviction); and *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 167-69 (1963) ("punishment cannot be imposed without a prior criminal trial and all its incidents"; whether governmental action

is "punishment" depends, in part, on "[w]hether the sanction involves an affirmative disability or restraint . . . whether its operation will promote the traditional aims of punishment — retribution and deterrence, [and] whether the behavior to which it applies is already a crime") (footnotes omitted).[9]

A governmental interest that "is simply not implicated" on the facts of a given case cannot be relied on to defeat a First Amendment claim. *Texas v. Johnson*, 491 U.S. at 404; *Spence v. Washington*, 418 U.S. 405, 414 n.8 (1974). Neither of the two interests identified by New York's highest court does or constitutionally could apply here, and the law must at a minimum be invalidated insofar as it applies to persons not shown to be duly convicted.

POINT III

SECTION 632-A IS INVALID EVEN UNDER *UNITED STATES V. O'BRIEN*

Finally, section 632-a would be invalid even if *O'Brien* supplied the correct standard of review.

Statutes regulating conduct are constitutional notwithstanding incidental burdens on speech "if the conduct itself may constitutionally be regulated, if the regulation is narrowly drawn to further a substantial governmental interest, and if the interest is unrelated to the suppression of free speech." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294 (1984). Contrary to the Board's argument (Bd. Br. 40-45), section 632-a fails each of these criteria.

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9 *See also Ingraham v. Wright*, 430 U.S. 651, 669, 671 n. 40 (1977); *Bell v. Wolfish*, 441 U.S. 520, 535-539 & n. 20 (1979); and *Gregg v. Georgia*, 428 U.S. 153, 183-184 & n. 30 (1976). Contrary to the implication left by the Board and some of its *amici*, the decision denying an inheritance in *Riggs v. Palmer*, 115 N.Y. 506, 22 N.E. 188 (1889), rested on Riggs' prior conviction for murdering the testator. *See also New York Mut. Life Ins. Co. v. Armstrong*, 117 U.S. 591 (1896) (conviction for murder led to forfeiture by assignee of insurance policy of payment under policy).

First, the "conduct" at issue — a publisher's expenditure for expression to be published — *cannot* constitutionally be regulated *qua* conduct. The Court so held in *Buckley*, rejecting "the view that the present Act's contribution and expenditure limitations are comparable to the restrictions on conduct upheld in *O'Brien*." 424 U.S. at 16. *See* S&S Br.26.

Second, the interest underlying the Son of Sam law is related, not unrelated, to the suppression of free speech. *See* S&S Br. 24-25; *see also* p. 6 *supra*.

Third, the law is not "narrowly drawn." *Clark*, 468 U.S. at 294. Although *O'Brien* does not import any least-restrictive means test, it nonetheless requires invalidation if "a substantial portion of the burden on speech does not serve to advance its goals," or if "the means chosen are . . . substantially broader than necessary to achieve the government's interest." *Ward v. Rock Against Racism*, 491 U.S. 781, 799-800.

Rarely can it have been so clear that "a substantial portion of the burden on speech" is entirely unnecessary and unproductive. To the considerable extent that it deters the publication of books subject to its terms — and this record demonstrates the effective suppression of three books Nicholas Pileggi would have written absent Son of Sam law impediments, the bowdlerization of an autobiography published by G. P. Putnam's Sons, and the belief of publishers and editors that the deterrent impact is substantial, see S&S Br. 10-12 — speech is heavily burdened without advancing any state interests whatever. On the other side of the balance is virtually nothing: in ten years the law has compensated the victims of only a single criminal, only a handful of additional escrow accounts have been established, and there is no showing or reason to believe that even in these cases the law had any marginal utility — that is, that compensation would not have been achieved thorough other available remedies, as it was in the case of Jack Henry Abbott. JA 35-36.[10] Since all of the state's legitimate

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10 The federal statute too "has not . . . generated any significant sum of money" since its enactment in 1984. U.S. Br. at 9 n. 12.

interests could be furthered by generally applicable enhancements to existing remedies (assuming the legislature was unhappy with existing remedies), such as extension of the statute of limitations in all actions by victims against criminals who injured them, the burden on speech created by section 632-a is entirely gratuitous.[11]

Just as clearly the law's means are substantially broader than necessary to achieve the interests identified by the Court of Appeals. The statute reaches far beyond the first interest by reaching assets that are in no sense "earned as a result of victimization," as exemplified by its application to the entire payment to Henry Hill for *Wiseguy* which was for hundreds of hours of conversation with Pileggi, not the "profit of crime." *See* S&S Br. 7, 36, 40-41, and pp. 13-14, *supra*. The statutory means are also far broader than necessary to further the interest in "punishment and disabilities," "denunciation," and "retribution," since these are impermissibly imposed on those who have not had the protection of a judicial trial. *See* Point II C *supra*.

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11 The Board's attempt to inflate the accomplishments of the Son of Sam law is highly misleading. *See* Bd. Br. 8 n. 13 and 17 n. 27. Section 632-a did not help the victims of David Berkowitz to obtain compensation. The Board's attempt to apply the statute to Berkowitz was rejected, since section 632-a as initially drafted did not apply to contracts entered into by conservators of criminals, as was its attempt to rely on a subsequent amendment. *New York State Crime Victims Board v. Johnsen*, Index 85067/77 (Sup. Ct. Kings Co. Nov. 24, 1981).

CONCLUSION

For the foregoing reasons and those set forth in our opening brief, the judgment below should be reversed, and the case remanded for entry of a declaration that section 632-a is unconstitutional, an injunction enjoining its enforcement, and an order awarding petitioner costs and attorneys' fees pursuant to 42 U.S.C. § 1988.

Respectfully submitted,

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